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JUL 27 2006

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1) Amended Appeal Brief (16 pages)

Inventor(s): Ludwig Busam et al.

S.N.: 09/674,052

Filed: October 25, 2000

Docket #: CM1778Q

Number of Pages Including this Page: 17

**RECEIVED
CENTRAL FAX CENTER****JUL 27 2006****IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Application No. : 09/674,052
Inventor(s) : Ludwig Busam et al.
Filed : October 25, 2000
Art Unit : 3761
Examiner : Michele M. Kidwell
Docket No. : CM1778Q
Confirmation No. : 9275
Customer No. : 27752
Title : Apertured Laminate Web

AMENDED APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir,

This amended Brief is filed in response to a Notification of Non-Compliant Appeal Brief dated July 21, 2006. This amended Brief also includes the amendments made to the in response to a Notification of Non-Compliant Appeal Brief dated March 31, 2006. The original Brief was filed pursuant to the appeal from the U.S. Patent and Trademark Office decision dated May 19, 2005 along with a request for a 1-month extension. A timely Notice of Appeal was filed on August 17, 2005 along with a Pre-appeal brief request for review. The decision by the review panel was mailed on November 16, 2005.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

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STATUS OF CLAIMS

Claims 1, 3, 4, and 6- 12, are pending and stand rejected. Claims 1, 3, 4, and 6- 12, are being appealed. A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

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STATUS OF AMENDMENTS

A Final Office Action was mailed on May 19, 2005. No amendment was filed in response thereto.

SUMMARY OF CLAIMED SUBJECT MATTER

The present invention pertains to an apertured laminate web suitable for use as a topsheet in a disposable absorbent article. Claim 1 pertains to the laminate web (item 40, Figures 1 and 2; item 60, Figure 3; item 140, Figure 4; item 240, Figures 5 and 6) comprising a liquid pervious first material (item 42, Figures 1 and 2; item 62, Figure 3; item 142, Figure 4; item 242, Figures 5 and 6; item 442, Figure 7) and a liquid pervious second material (item 44, Figures 1 and 2; item 64, Figure 3; item 144, Figure 4; item 244, Figures 5 and 6; item 444, Figure 7) attached to the first material. (page 9, lines 8-10). The first material has a plurality of apertures (item 46, Figures 1 and 2) with an effective size of at least 0.2 square millimeters, and the first material has an effective open area of at least about 10 percent. (page 9, lines 26-36).

The second material has a plurality of apertures (item 48, Figure 2) with an effective size of at least 0.2 square millimeters, and the second material has an effective open area of at least about 10 percent. (page 12, lines 25-36; page 13, lines 3-8). The plurality of apertures of the second material are aligned with the apertures of the first material. (page 13, lines 14-17). Additionally, the second material has a hydrophilicity which is greater than the hydrophilicity of the first material. (page 13, lines 18-19).

A plurality of fibers of the first material and a plurality of fibers of the second material are substantially fused together about the apertures. (page 15, lines 13-17). Additionally, the second material has a bonded area which is greater than a bonded area of the first material. (page 14, lines 22-25).

Claim 10 depends from claim 1 and pertains to the laminate web described above, wherein the first material has a first width and the second material has a second width. As recited in part, in claim 10, the second width is greater than the first width. (page 13, lines 27-32).

Claim 12 depends from claim 11 which depends from claim 1 and pertains to a disposable absorbent article. The disposable absorbent article comprises the liquid pervious topsheet (item 24, Figures 1 and 2; item 124, Figure 4) comprising the laminate

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web according to claim 1. (page 6, lines 10-11; page 9, lines 8-9). The disposable absorbent article further comprises a backsheet (item 26, Figure 1) and an absorbent core (item 28, Figure 1) positioned between the topsheet and the backsheet. (page 6, lines 10-13).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

- I. Claims 1, 3-4, and 6-9, and 11, stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,437,653 issued to Gilman et al., hereafter, "Gilman".
- II. Claim 10 stands rejected under 35 U.S.C. § 102(b) as being anticipated by Gilman.
- III. Claim 12 stands rejected under 35 U.S.C. § 102(b) as being anticipated by Gilman.

ARGUMENTS

- I. Claims 1, 3-4, and 6-9, and 11, have been improperly rejected under 35 U.S.C. § 102(b).

It is well settled that a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

A. Claim 1

1. **Gilman does not teach the second material having a hydrophilicity greater than the first material.**

In general, Gilman teaches an absorbent article having two co-apertured layers. (Abstract). Gilman further teaches that a cover 12 may include a plurality of apertures 18 which are formed therethrough. (col. 3, lines 31-32). Gilman also teaches an absorbent 14 having three separate and distinct absorbent layers 20, 22, and 24. (col. 4, lines 39-41). The absorbent layer 20 "also contains a plurality of apertures 26 coaxially aligned with at least some of the apertures 18 formed in the cover 12." (col. 5, lines 9-11).

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Claim 1 recites, *inter alia*, "wherein said second material has a hydrophilicity which is greater than the hydrophilicity of said first material." In contrast, at col. 6, lines 1-3, Gilman teaches that "[b]oth layers 22 and 24 can be constructed of a hydrophilic material formed from various types of natural or synthetic fibers." (col. 6, lines 1-3). However, Gilman does not teach the relative hydrophilicities of the cover 12 with respect to the absorbent 14. Consequently, Gilman does not teach all of the claim elements of the independent claim 1.

2. Gilman does not teach the second material having apertures.

Claim 1, recites, *inter alia*, that the second material comprises a plurality of apertures. As shown in Appellant's application, the apertures 48 extend through the thickness of the second material 44. (See Figure 2 of Appellant's application).

The Office asserts that Gilman teaches this claim element and cites col. 5, lines 9-11. However, at col. 5, lines 9-11, Gilman teaches that "[t]he absorbent layer 20 also contains a plurality of apertures 26 coaxially aligned with at least some of the apertures 18 formed in the cover 12." However, the Office regards the second material of Gilman as the absorbent 14 which comprises absorbent layers 20, 22, and 24. Because Gilman does not teach that the absorbent layers 22 and 24 comprise apertures, Appellants assert that Gilman does not teach the second material having apertures.

3. Gilman does not teach a second material having a higher hydrophilicity than the first material and the second material having a plurality of apertures aligned with the apertures of the first material.

As stated previously, the Office asserts that Gilman teaches a second material having a higher hydrophilicity than the first material and cites col. 6, lines 1-3 of Gilman. At col. 6, lines 1-3, Gilman teaches that "[b]oth layers 22 and 24 can be constructed of a hydrophilic material formed from various types of natural or synthetic fibers." The Office, with this assertion, requires the absorbent 14 (the asserted second material) to include layers 20, 22, and 24.

Additionally, as stated previously, the Office asserts that Gilman teaches a second material having a plurality of apertures which are aligned with the apertures of the first material and cites col. 5, lines 9-11. At col. 5, lines 9-11, Gilman teaches that "[t]he absorbent layer 20 also contains a plurality of apertures 26 coaxially aligned with at least

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some of the apertures 18 formed in the cover 12.” As stated previously, Gilman does not teach that the absorbent layers 22 and 24 comprise apertures. So, the Office, with this assertion, requires the absorbent 14 (the asserted second material) to include only layer 20 and exclude layers 22 and 24.

Appellants assert that the two claim elements above cannot coexist within the teachings of Gilman. If Gilman does teach a second material having a higher hydrophilicity than the first material, then Gilman cannot teach that the second material also comprises apertures (as defined within the specification of the Appellants). Alternatively, if Gilman does teach a second material comprising apertures which are aligned with apertures of the first material, then Gilman cannot teach a second material having a higher hydrophilicity than a first material.

4. **Gilman does not teach a first material having a first bonded area and a second material having a second bonded area, wherein the second bonded area is greater than the first bonded area.**
 - a. **Gilman provides no express or inherent teaching of a second bonded area which is greater than the first bonded area.**

Claim 1 recites, *inter alia*, “wherein said first material has a first bonded area and said second material has a second bonded area, and wherein said second bonded area is greater than said first bonded area.” The Office asserts that Figure 1 of Gilman sets forth “wherein said first material has a first bonded area, said second material has a second bonded area, and wherein the second bonded area is greater than the first bonded area.” (Paper No. 051105, page 2). For purposes of clarification, in Paper No. 122304, the Office previously stated:

If the entire bonded area (the length of the article as set forth in col. 3, lines 55 — 56) of the second material (20) is compared to only the outermost portion (i.e., the area to the left of the article in figure 1 where reference character “18” is located) of the bonded area of the first material (12), the second material (20) has a bonded area greater than a bonded area of the first material.

(Paper No. 122304, page 5).

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Appellants assert that the Office has failed to give the term “bonded area” its ordinary and customary meaning that one of ordinary skill in the art would ascribe to the term or its meaning based on the application. The Federal Circuit has re-iterated that words in claims are considered from the perspective of one of ordinary skill in the art to which the patent is directed or most closely connected. *Phillips v. AWH Corporation*, 415 F.3d 1303, 1313, 75 U.S.P.Q. 2d 1321 (Fed. Cir. 2005). Additionally, the claims are considered from the perspective of one of such ordinary skill at the time the invention was made (usually the effective filing date of the patent application). *Id.* Generally, words of claims are given the “ordinary and customary meaning” one of ordinary skill in the art would ascribe to them. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 39 U.S.P.Q.2d 1573 (Fed. Cir. 1996). It is well-settled and reaffirmed in *Phillips* that “customary meaning” refers to the “customary meaning in the art field.” *Phillips* at 1314.

Importantly, the person of ordinary skill in the art is deemed to read a claim term not only in the context of the particular claim in which it appears, but in the context of the entire patent, including the remainder of the specification. *Phillips*, at 1314. In many cases, determining the ordinary meaning of the claim requires examination of terms that have a particular meaning in a field of art. Because the meaning of a claim term as understood by persons of skill in the art is often not immediately apparent, and because patentees frequently use terms idiosyncratically, the court looks to “those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean.” *Phillips*, at 1314, quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc.*, 381 F.3d 1111 (Fed. Cir. 2004). Such sources are the claims themselves (including the other claims), the remainder of the specification, the prosecution history, and extrinsic evidence concerning scientific principles, the meaning of technical terms, and the state of the art. *Id.* Nevertheless, even though all of these sources may be considered, the specification is always highly relevant to claim analysis and is the single best guide to the meaning of a disputed term. *Phillips*, at 1315 citing *Vitronics*, 90 F.3d at 1582.

Consistent with this principle, the specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, the inventor’s lexicography governs. *CCS Fitness Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366, 62 USPQ2d 1658, 1662 (Fed. Cir. 2001). In other cases the specification may reveal an intentional disclaimer, or disavowal of claim scope by the inventor. In this instance as well, the inventor has dictated the correct claim scope and the inventor’s intention, as expressed in the specification is regarded as

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dispositive. *SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1343-44 (Fed. Cir. 2001).

Regarding the term "bonded area" the Appellant's application states:

Since the first material will be the material adjacent the wearer's skin in use, the first material is preferably soft. With thermally bonded nonwoven webs, the amount of **bonded area** of the web is a factor in determining the softness and also the tensile strength of the web. As the **bonded area** of the web increases, the softness decreases and the tensile strength increases. In contrast, as the **bonded area** of the web decreases, the softness increases and the tensile strength decreases. In order to provide a laminate web which is both soft and strong, it is preferred that the first material have a relatively lower **bonded area** to provide softness and the second material have a relatively higher **bonded area** to provide strength. The first material preferably has a **bonded area** of from about 0% to about 25%, more preferably from about 5% to about 15%. The second material preferably has a **bonded area** of from about 0% to about 35%, more preferably from about 10% to about 20%.

(Application page 14, lines 14-25)(emphasis added).

Additionally, as explained in a response to Office Action dated August 17, 2005, thermally bonded webs are typically created by bonding the fibers which makeup the web together. Fibers of a thermally bonded web can be bonded via heated calender rolls. As the fibers pass through the heated calender rolls, the fibers can be melted in certain spots to form bonds between the fibers. The calender rolls can be configured to affect the desired number of bonds between the fibers of a web. For example, a pair of first calender rolls could produce a first web having a low number of fiber to fiber bonds such that the first web is soft. In contrast, a pair of second calender rolls could produce a second web having a high number of fiber to fiber bonds such that the second web has a high tensile strength.

As shown in Figure 5 of the Appellant's application, the first material 242 can be fed as a web from a supply roll 210. The web of first material has a first bonded area which is governed in part by the calender rolls used to manufacture the web of first material. Similarly, the second material 244 can be fed as a web from a supply roll 212.

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The web of second material has a second bonded area which is governed in part by the calender rolls used to manufacture the web of second material.

Based on the Appellant's application, the term "bonded area" refers to properties of the first material and the second material. Accordingly, the term "first bonded area" pertains to the percentage of fiber to fiber bonds in the first material, and the term "second bonded area" pertains to the percentage of the fiber to fiber bonds in the second material. Thus, the term "first bonded area" is not attributed solely to a portion of the first material. Similarly, the term "second bonded area" is not attributed solely to a portion of the second material.

As stated above, the rejection of the Office compares the second material and only the outermost portion of the cover 12 and does not take into account the meaning attributed to the term "bonded area" in the application. Appellant's assert that Gilman does not teach "wherein said first material has a first bonded area and said second material has a second bonded area, and wherein the second bonded area is greater than said first bonded area", as is recited, *inter alia*, in independent claim 1.

b. The Office improperly relies on the teachings of Figure 1 of Gilman to teach the claim elements of independent claim 1.

In its rejection, the Office states that "[r]egarding claim 1, Gilman et al. discloses... wherein said first material has a first bonded area and said second material has a second bonded area and wherein the second bonded area is greater than the first bonded area as set forth in Figure 1." (Paper No. 051105, page 2). However, Figure 1 does not show the bonded area of either the cover 12 or the absorbent layer 20, as the term is defined in the application.

Additionally, it is well settled that drawings can be used for the purposes of prior art. However, case law provides that in order for a drawing or picture to anticipate a claim, the drawing or picture must clearly show the claimed structure. *In re Mraz*, 455 F.2d 1069, 173 USPQ 25 (CCPA 1972). Additionally, all of the claimed structural features and how they are put together, must be shown by the picture as well. *Jockmus v. Leviton*, 28 F.2d 812 (2d Cir. 1928). Moreover, where "the reference does not disclose that the drawings are to scale and is silent as to dimensions, arguments based on measurement of the drawing features are of little value." MPEP §2125 citing *Hockerson-*

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Halberstadt, Inc. v. Avia Group Int'l, 222 F.3d 951, 956, 55 USPQ2d 1487, 1491 (Fed. Cir. 2000).

Because Figure 1 of Gilman does not disclose the bonded area of either the cover 12 or the absorbent layer 20, Figure 1 cannot anticipate independent claim 1.

c. The claim element of “bonded area” is not a product by process limitation.

In its rejection, it appears as though the Office asserts that the claim elements “first bonded area” and “second bonded area” are product by process limitations. Appellants respectfully disagree.

The claim elements “first bonded area” and “second bonded area” recite the structure of the first and the second materials, respectively. Any mention of the process supplied by the Appellant whether in this Appeal Brief or during prosecution was for background purposes and enhanced understanding of the term “bonded area”. As stated previously, the term “first bonded area” is a physical property of the first material which corresponds to the number of fiber to fiber bonds in the first material. Similarly, the term “second bonded area” is a physical property of the second material which corresponds to the number of fiber to fiber bonds in the second material.

For the foregoing reasons, Appellants assert that claim 1 is not anticipated by Gilman.

B. Claims 3-4, 6-9, and 11.

The law provides that “[a] claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers.” 35 U.S.C. § 112, 4th paragraph (2003). Because claims 3, 4, 6-9, and 11, depend from claim 1, claims 3, 4, 6-9, and 11, include all of the claim elements of claim 1. As established previously, with regard to section I.A., Gilman does not teach all of the claim elements of claim 1. Accordingly, Appellants assert that Gilman similarly does not teach all of the claim elements of dependent claims 3, 4, 6-9, and 11.

II. Gilman fails to teach all of the claim elements of claim 10.

Claim 10 recites, *inter alia*, that the first material has a first width and the second material has a second width, wherein the second width is greater than the first width. The Office asserts that “Gilman discloses a laminate web wherein the second material has a

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width greater than that of the first material as set forth in Figure 1.” (Paper No. 051105, page 4). The Office, in its rejection, compares “the entire width of the second material (20)... to only the outermost width... of the first material (12).” (Paper No. 051105, page 4).

Regarding the width of the second material and the width of the first material, the Appellant’s application states:

In the embodiment shown in Figures 1 and 2, the second material 44 has a width greater than that of the first material 42. While the width of the first material 42 is less than the width of the second material 44, the first material 42 preferably has a width at least equal to that of the underlying absorbent core, and more preferably, the first material 42 has a width greater than that of the underlying absorbent core.

(Application, page 13, lines 27-32).

As stated in the Appellants’ application, the width of the first material pertains to the entire width of the first material and not just a portion thereof. Similarly, the width of the second material pertains to the entire width of the second material and not just a portion thereof. Additionally, as shown in Figure 2, the width of the first material 42 is less than the width of the second material 44. Because the rejection by the Office compares the entire width of the second material (20)... and only the outermost width... of the first material (12), the rejection does not take into account the meaning attributed to the term “width” in the application. Therefore, Gilman does not teach that a second material has a greater width than a first material.

Additionally, because claim 10 depends from claim 1 and because of the foregoing arguments, with regard to claim 10, Appellants assert that claim 10 is not anticipated by Gilman.

III. Gilman fails to teach all of the claim elements of claim 12.

Claim 12 recites, “[t]he disposable absorbent article of claim 11 further comprising a backsheet joined to said topsheet, and an absorbent core positioned between said topsheet and said backsheet.” The Office asserts that “Gilman discloses a disposable absorbent article further comprising a backsheet (16) joined to the topsheet (col. 7, lines 51-52), and an absorbent core (22) positioned between the topsheet and the backsheet as set forth in Figure 1.” (Paper No. 051105, page 4).

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As stated previously, with regard to section I.A.1 - I.A-3, if absorbent layer 22 is deemed to be the absorbent core, then the second material of Gilman is limited to the absorbent layer 20. Because Gilman does not teach relative hydrophilicities between the cover 12 and the absorbent layer 20, Gilman does not teach that the second material has a higher hydrophilicity than the first material.

Additionally, because claim 12 depends from claim 1 and because of the foregoing arguments, with regard to claim 12, Appellants assert that claim 12 is not anticipated by Gilman.

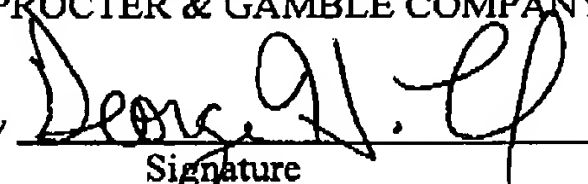
SUMMARY

The Federal Circuit has stated that "[i]f examination at the initial stage does not produce a prima facie case of unpatentability, then without more the applicant is entitled to grant of the patent." *In re Oetiker*, 977 F.2d 1443, 1446, 24 U.S.P.Q.2d 1443 (Fed. Cir. 1992). In view of all of the above, it is respectfully submitted that claims 1, 3, 4, and 6-12, have not been properly rejected under 35 U.S.C. § 102(b) because Gilman does not anticipate claims 1, 3, 4, and 6-12. Therefore, in light of all of the analysis and discussion provided above, Appellants respectfully request the Board of Patent Appeals and Interferences to reverse the rejections of claims 1, 3, 4, and 6-12, to remand the application with instructions that these claims be allowed over the cited documents.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY

By



Signature

George H. Leal

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CLAIMS APPENDIX

1. (Rejected) A laminate web comprising a liquid pervious first material and a liquid pervious second material attached to said first material, characterized by:
said first material having an effective open area of at least about 10 percent and a plurality of apertures with an effective size of at least 0.2 square millimeters, said second material having an effective open area of at least about 10 percent and a plurality of apertures with an effective size of at least 0.2 square millimeters, said apertures of said second material being aligned with said apertures of said first material, wherein said second material has a hydrophilicity which is greater than the hydrophilicity of said first material, wherein a plurality of fibers of said first material and a plurality of fibers of said second material are substantially fused together about the apertures, wherein said first material has a first bonded area and said second material has a second bonded area, and wherein said second bonded area is greater than said first bonded area.
2. (Canceled).
3. (Rejected) The laminate web according to Claim 1 wherein said first material is a nonwoven web.
4. (Rejected) The laminate web according to Claim 1 wherein said second material is a nonwoven web.
5. (Canceled).
6. (Rejected) The laminate web according to Claim 1 wherein said first and second materials each have an effective open area of at least about 15 percent.
7. (Rejected) The laminate web according to Claim 1 wherein said first and second materials each have an effective open area of at least about 20 percent.

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8. (Rejected) The laminate web according to Claim 1 wherein said first and second materials each have a plurality of apertures with a size of at least 1.0 square millimeter.
9. (Rejected) The laminate web according to Claim 1 wherein said first and second materials each have a plurality of apertures with a size of at least 2.0 square millimeters.
10. (Rejected) The laminate web according to Claim 1 wherein said first material has a first width and said second material has a second width, wherein said second width is greater than said first width.
11. (Rejected) A disposable absorbent article comprising a liquid pervious topsheet comprising the laminate web according to Claim 1.
12. (Rejected) The disposable absorbent article of claim 11 further comprising a backsheet joined to said topsheet, and an absorbent core positioned between said topsheet and said backsheet.

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EVIDENCE APPENDIX

There is no additional information for the Evidence Appendix in this appeal.

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RELATED PROCEEDINGS APPENDIX

There is no additional information for the Relating Proceedings Appendix in this appeal.